

15 14 15
Nos. 85-1377, 85-1378, 85-1379

Supreme Court, U.S.

FILED

APR 9 1986

JOSEPH F. SPANIOLO, JR.
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1985

CHARLES A. BOWSER,
COMPTROLLER GENERAL OF THE UNITED STATES, *et al.*,
v. *Appellants,*

MIKE SYNAR, MEMBER OF CONGRESS, *et al.*,
Appellees.

On Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLEE
NATIONAL TREASURY EMPLOYEES UNION

LOIS G. WILLIAMS *
Director of Litigation
GREGORY O'DUDEN
Assistant Director of Litigation
RICHARD S. EDELMAN
ELAINE D. KAPLAN
CARY P. SKLAR
Assistant Counsels
NATIONAL TREASURY
EMPLOYEES UNION
1730 K St., N.W., Suite 1101
Washington, D.C. 20006
(202) 785-4411
Counsel for Appellees,
National Treasury Employees
Union, et al.

* Counsel of Record

April 1986

QUESTIONS PRESENTED

I. Did the court below err in concluding that the budget reduction mechanism in the Balanced Budget and Emergency Deficit Control Act of 1985 was not an unconstitutional delegation of legislative power where:

- a) the Act gives unelected officials with the unprecedented power to undo duly enacted appropriations law and to make spending reductions automatically, without congressional approval;
- b) the Act was designed to avoid congressional accountability by allowing the federal budget to be balanced in a way that insulated members of Congress from having to vote on specific budget cuts or tax increases;
- c) the Act provides no meaningful guidance to its administrators in making required budget deficit forecasts which ultimately determine the spending levels of the entire federal budget; and
- d) the Act precludes judicial review of the administrators' pivotal deficit forecasts.

II. Did the court below correctly hold that 'the Act violates separation of powers principles in assigning a significant executive role to the Comptroller General, an official who is removable by and otherwise answerable only to Congress?

TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE	1
1. The Gramm-Rudman Act	1
2. Proceedings Below	5
SUMMARY OF ARGUMENT	7
ARGUMENT	8
THE ACT'S AUTOMATIC DEFICIT REDUCTION PROCESS IS UNCONSTITUTIONAL	8
INTRODUCTION	8
I. THE AUTOMATIC DEFICIT REDUCTION PROCESS CONSTITUTES AN UNCONSTITUTIONAL DELEGATION OF CONGRESS' RESPONSIBILITY TO SET SPENDING LEVELS	9
A. The Governing Principles of the Delegation Doctrine Underscore that Fundamental Policy Choices, Such as Those Required to Establish the Contours of Federal Spending, Must Be Made by Congress and Not by Unelected Officials	9
B. The Statute's Automatic Deficit Reduction Mechanism Frustrates the Delegation Doctrine's Central Purpose of Ensuring that Elected Legislators Be Accountable for the Fundamental Policy Determinations Concerning the Setting of Federal Spending Levels	14
1. The Automatic Mechanism Represents an Incomplete Exercise of the "Essentials of the Legislative Function"	14

TABLE OF CONTENTS—Continued

	Page
2. The Act Provides Insufficient Standards to Guide the Administrators in the Making of the Critical Budget Deficit Projections Which Ultimately Form the Basis of an Automatically Enacted Federal Spending Law	21
3. The Rationale of "Governmental Necessity" Cannot Justify the Act's Delegation..	28
4. The Unchecked Nature of the Discretion Vested in the Act's Administrators Is Underscored by the Preclusion of Judicial Review of the Crucial Budget Projections that Determine the Magnitude of Required Reductions in Federal Spending....	31
II. THE ACT VIOLATES THE SEPARATION OF POWERS BY DELEGATING TO THE COMPTROLLER GENERAL, AN OFFICIAL REMOVABLE BY CONGRESS, A SIGNIFICANT ROLE IN THE ADMINISTRATION OF THE ACT	33
A. Separation of Powers Principles Dictate that Congress May Not Both Make and Execute the Law	35
B. The Comptroller General Is Beholden to Congress by Virtue of the Congressional Removal Power and of His Complete Independence from the President	37
C. The Court Below Properly Struck Down the Act's Grant of Powers to the Comptroller General, Rather than the Removal Provisions of the 1921 Act	43
CONCLUSION	48

TABLE OF AUTHORITIES

CASES:	Page
<i>A.L.A. Schechter Poultry Corp. v. United States</i> , 295 U.S. 495 (1935)	11, 24, 29
<i>Amalgamated Meat Cutters v. Connally</i> , 337 F.Supp. 737 (D.D.C. 1971)	13, 26, 29, 31
<i>Ameron v. U.S. Army Corps of Engineers, et al.</i> , Nos. 85-5226 and 85-5377 (<i>slip op.</i> , 3rd Cir., March 27, 1986)	36
<i>Arizona v. California</i> , 373 U.S. 546 (1963)	11
<i>Bowles v. Willingham</i> , 321 U.S. 503 (1944)	31
<i>Bowsher v. Merck & Co.</i> , 460 U.S. 824 (1983)	38
<i>Buckley v. Valeo</i> , 424 U.S. 1 (1976)	<i>passim</i>
<i>Buttfield v. Stranahan</i> , 192 U.S. 470 (1904)	13
<i>Champlin Refining Co. v. Corporation Commission</i> , 286 U.S. 210 (1932)	47
<i>Clark v. Kinnett</i> , 431 U.S. 950 (1977)	41
<i>Clark v. Valeo</i> , 559 F.2d 642 (D.C. Cir. 1977)	41
<i>Consumer Energy Council v. FERC</i> , 673 F.2d 425 (D.C. Cir. 1982), <i>aff'd</i> , 463 U.S. 1216 (1983)	36
<i>Curran v. Wallace</i> , 306 U.S. 1 (1939)	27, 28
<i>Delta Data Systems Corp. v. Webster</i> , 744 F.2d 197 (D.C. Cir. 1984)	38
<i>Field v. Clark</i> , 143 U.S. 649 (1892)	11, 26, 28
<i>Glidden v. Zdanock</i> , 370 U.S. 530 (1962)	44
<i>Humphrey's Executor v. United States</i> , 295 U.S. 602 (1935)	40, 41, 42
<i>Immigration and Naturalization Service v. Chadha</i> , 462 U.S. 919 (1983)	<i>passim</i>
<i>In re Hennen</i> , 38 U.S. (13 Pet.) 230 (1839)	42
<i>Industrial Union Dept. v. American Petroleum</i> <i>Inst.</i> , 448 U.S. 607 (1980)	13, 17, 29, 30
<i>J.W. Hampton, Jr. & Co. v. United States</i> , 276 U.S. 394 (1928)	10, 12
<i>Kent v. Dulles</i> , 357 U.S. 116 (1958)	11
<i>McDonnell Douglas Corp. v. United States</i> , 754 F.2d 365 (Fed. Cir. 1985)	38
<i>McGautha v. California</i> , 402 U.S. 183 (1971)	13
<i>Myers v. United States</i> , 272 U.S. 52 (1926)	42, 43, 44
<i>National Cable Television Association v. United</i> <i>States</i> , 415 U.S. 336 (1974)	11
<i>Nixon v. Administrator of General Services</i> , 433 U.S. 425 (1977)	35

TABLE OF AUTHORITIES—Continued

	Page
<i>Northern Pipeline Co. v. Marathon Pipe Line Co.</i> , 458 U.S. 50 (1982)	<i>passim</i>
<i>Panama Refining Co. v. Ryan</i> , 293 U.S. 388 (1935) ..	10, 11
<i>Regan v. Time Inc.</i> , — U.S. —, 104 S.Ct. 3262 (1984)	47
<i>Springer v. Government of the Philippines</i> , 277 U.S. 189 (1928)	43, 44
<i>The Cargo of the Brig Aurora v. United States</i> , 11 U.S. (7 Cranch) 382 (1812)	26, 27
<i>United States v. Grimaud</i> , 220 U.S. 506 (1911)	33
<i>United States v. Jackson</i> , 390 U.S. 570 (1968)	47
<i>United States v. McDonnell Douglas Corp.</i> , 751 F.2d 220 (8th Cir. 1984)	38
<i>United States v. Robel</i> , 389 U.S. 258 (1967)	12, 13
<i>United States v. Rock Royal Co-operative</i> , 307 U.S. 533 (1939)	26, 27, 28
<i>Yakus v. United States</i> , 321 U.S. 414 (1944)	<i>passim</i>
<i>Youngstown Sheet & Tube Co. v. Sawyer</i> , 343 U.S. 579 (1952)	36

CONSTITUTION AND STATUTES:

U.S. Const. art. I, sections 1, 8	10
U.S. Const. art. I, section 9, cl. 7	10
U.S. Const. art. III	44
Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. 99-177, 99 Stat. 1037	1
Section 201 (a) (1)	22
Section 201 (b), amending Section 300 of Pub. L. 93-344	3
Section 201 (b), amending Sections 301 (a) and (i) of Pub. L. 93-344	3
Section 251 (a) (1)	3
Section 251 (a) (1) (C)	25
Section 251 (a) (2)	3, 22
Section 251 (a) (3)	3, 22
Section 251 (a) (3) (B)	4
Section 251 (a) (3) (C)	4
Section 251 (a) (3) (F)	4
Section 251 (a) (5)	3
Section 251 (a) (6) (A)	25
Section 251 (a) (6) (B)	25

TABLE OF AUTHORITIES—Continued

	Page
Section 251 (a) (6) (C)	25
Section 251 (b)	3
Section 251 (c)	4
Section 252 (a) (1)	4
Section 252 (a) (3)	4
Section 252 (a) (6) (C)	4
Section 252 (b)	4
Section 252 (b) (1) - (3)	22
Section 253	34
Section 254 (a)	25
Section 255	22
Section 256	22
Section 257	22
Section 257 (4)	22
Section 257 (6)	25
Section 274 (a) - (c)	4
Section 274 (d)	32
Section 274 (f)	5
Section 274 (h)	4, 31
Budget and Accounting Act of 1921, Pub.L. 13, 42 Stat. 20 (codified at 31 U.S.C. 701, <i>et seq.</i>)	45, 46, 47
Congressional Budget and Impoundment Act of 1974, Pub. L. 93-344, 88 Stat. 297 (1974)	2
2 U.S.C. 601 (a) (4) (1982)	34
2 U.S.C. 703 (b)	38
31 U.S.C. 703 (a)	37
31 U.S.C. 703 (e) (1) (B)	37
31 U.S.C. 1105 (f), as amended by Section 241 (b) ..	2
31 U.S.C. 3551-3556	36
41 U.S.C. 601, <i>et seq.</i>	38

LEGISLATIVE MATERIALS:

<i>Hearings on H.J. Res. 372 Before the Subcomm. on Legislation and National Security of the House Comm. on Gov't. Operations, 99th Cong., 1st Sess., 156-157 (1985)</i>	<i>1, 23, 24</i>
59 Cong. Rec. 8611 (1920)	46
131 Cong. Rec. S12082 (Sept. 25, 1985)	1
131 Cong. Rec. S12085 (Sept. 25, 1985)	1
131 Cong. Rec. S12900 (Oct. 8, 1985)	20
131 Cong. Rec. S12961 (Oct. 9, 1985)	17

TABLE OF AUTHORITIES—Continued

	Page
131 Cong. Rec. S12962 (Oct. 9, 1985)	16, 19, 20
131 Cong. Rec. S12966 (Oct. 9, 1985)	19
131 Cong. Rec. S12973 (Oct. 9, 1985)	19
131 Cong. Rec. S13092 (Oct. 10, 1985)	19
131 Cong. Rec. S13107 (Oct. 10, 1985)	19
131 Cong. Rec. S13108 (Oct. 10, 1985)	19
131 Cong. Rec. S14905 (Nov. 6, 1985)	24
131 Cong. Rec. S14906-07 (Nov. 6, 1985)	24
131 Cong. Rec. S14917 (Nov. 6, 1985)	19
131 Cong. Rec. S14919 (Nov. 6, 1985)	16
131 Cong. Rec. S17389 (Dec. 11, 1985)	2, 16, 19, 20
131 Cong. Rec. S17390 (Dec. 11, 1985)	19
131 Cong. Rec. S17410 (Dec. 11, 1985)	20
131 Cong. Rec. S17425-26 (Dec. 11, 1985)	15
131 Cong. Rec. S17427 (Dec. 11, 1985)	15, 16
131 Cong. Rec. S17429 (Dec. 11, 1985)	20
131 Cong. Rec. S17430 (Dec. 11, 1985)	19, 20
131 Cong. Rec. S17431 (Dec. 11, 1985)	20
131 Cong. Rec. S17435 (Dec. 11, 1985)	20
131 Cong. Rec. S17441 (Dec. 11, 1985)	19
131 Cong. Rec. S17442 (Dec. 11, 1985)	30
131 Cong. Rec. H9607 (Nov. 1, 1985)	18, 19
131 Cong. Rec. H11881 (Dec. 11, 1985)	16, 17
131 Cong. Rec. H11885 (Dec. 11, 1985)	17
131 Cong. Rec. H11887 (Dec. 11, 1985)	2
131 Cong. Rec. H11885-90 (Dec. 11, 1985)	17
131 Cong. Rec. H11889 (Dec. 11, 1985)	16
131 Cong. Rec. H11890 (Dec. 11, 1985)	19

BOOKS AND ARTICLES:

J. Ely, <i>Democracy and Distrust</i> (1980)	13, 30
<i>The Federalist</i> , No. 51, p. 22 (J. Madison) (Mc- Lean ed., New American Library, 1961)	30
<i>The Federalist</i> , No. 79, p. 472 (Hamilton) (Mc- Lean ed., New American Library, 1961)	39
<i>The Forecasters Flunk</i> , Time 42 (Aug. 27, 1984) ..	26
<i>What Good Are Economists?</i> , Newsweek 61 (Feb. 4, 1985)	26
<i>When Economic Forecasters Miss the Target</i> , U.S. News & World Report 80 (Nov. 12, 1984)	26
Wright, <i>Book Review</i> , 81 Yale L.J. 575 (1972)	13, 17

BRIEF FOR APPELLEE
NATIONAL TREASURY EMPLOYEES UNION

STATEMENT OF THE CASE

At issue in this appeal is the constitutionality of the automatic spending reduction mechanism created by the Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. 99-177, commonly known as the Gramm-Rudman Act. Under the Act, the Comptroller General, with the help of the Office of Management and Budget (OMB), and the Congressional Budget Office (CBO), is charged with predicting the magnitude of the budget deficit for the coming fiscal year. A prediction that the deficit will exceed the statutory target automatically triggers reductions in spending levels previously set by duly-enacted legislation.

1. The Gramm-Rudman Act

a. The legislative history of the Gramm-Rudman Act¹ unequivocally reveals that Congress created the automatic spending reduction mechanism because it wanted to reduce the size of the federal budget deficit, but found no consensus to do so under the ordinary budget process.² The legislative debates show that Congress was not able to reduce the deficit under the ordinary process because, collectively and individually, its Members would not openly endorse the requisite spending cuts, or tax in-

¹ The Gramm-Rudman bill, S.1702, was an amendment to H.J. Res. 372, a bill to increase the ceiling on the national debt. There were no Senate hearings, committee mark-ups or reports on the bill. After H.J. Res. 372 passed the Senate, it went to conference. While the bill was in conference, there were hearings on Gramm-Rudman in the House. *See Hearings on H.J. Res. 372 Before the Subcomm. on Legislation and National Security of the House Comm. on Gov't. Operations, 99th Cong., 1st Sess. (1985) ("House Hearings")*.

² *See, e.g.,* 131 Cong. Rec. S12082 (Sept. 25, 1985) (remarks of Sen. Gramm); 131 Cong. Rec. S12085 (Sept. 25, 1985) (remarks of Sen. Rudman). All references to volume 131 of the Congressional Record are to the daily edition.

volved was not excessive and that the involvement of the Congressional Budget Office ("CBO") in the process of administering the law does not violate principles of separation of powers. The congressional appellees, like the appellee National Treasury Employees Union ("NTEU"), agree that the judgment of unconstitutionality should be affirmed. However, they disagree with the rulings below that the delegation was not excessive and that the role of CBO does not invalidate the process for making spending reductions. Accordingly, this brief will discuss only those two issues (questions 1 and 2) and will leave question 3 to the briefs of NTEU and the United States.

STATEMENT OF THE CASE

At issue on this appeal is the constitutionality of the principal spending reduction mechanism in the Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177 (the "Act"), more commonly known as the Gramm-Rudman Act. The purpose of the Act, which plaintiffs support, is to reduce the size of the federal deficit. The difficulty is that the means chosen to accomplish this end are fundamentally at odds with the constitutional requirements for making spending decisions under our democratic system of government.

In order to understand why the Act is unconstitutional, it is necessary to consider in much greater detail than did the district court and the briefs of the appellants the reasons why Congress passed the Act, including in particular what it hoped to accomplish through the legislation. It is then necessary to analyze the operation of the Act so that the precise functions performed by each of the principal agencies are clear and hence can be evaluated in light of the standards applicable to challenges based on the doctrines of undue delegation and separation of powers.

1. WHY GRAMM-RUDMAN?

With increasing frequency and fervor, individuals inside the government and out have expressed concern about the size of the budget deficit. The President, as well as members of Con-

gress in both Houses, in both parties, and of all different political views, are in seeming agreement that the deficits are simply too large. The problem has been that agreement has not been reached on how to either raise the additional revenues or reduce federal spending in sufficient amounts to balance the budget, or at least to reduce the deficit significantly.

For over a decade, since the Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344 (the "Budget Act"), was passed, Congress has had a budget process which requires it to focus on the budget as a whole, before turning to individual appropriations bills. That has not been enough, however, in part because the various spending bills come to the floor separately, and the harsh choices can be avoided simply by voting for everything. Of course, nothing compels any member of Congress, let alone both Houses, to vote consistently to increase the deficit, but the many pressures on members tend to push in that direction.

One way to deal with the problem is a constitutional amendment to require a balanced federal budget each year. Such a measure obtained the necessary two-thirds vote in the Senate in 1982, but a similar resolution fell short in the House, although it did obtain more than a majority. *See* S. Rep. No. 99-163, 99th Cong., 1st Sess. 12 (1985). But even if such an amendment passed both Houses, it would still have to be ratified by three-quarters of the states within the seven years allowed, and hence such an approach would do nothing for the short or intermediate term problem.

This is the background that lead to the introduction on September 25, 1985, by Senator Phil Gramm and twenty-three other Senators, of S. 1702, the Gramm-Rudman bill, which was intended to be, and finally was, attached to a bill that could not be postponed or simply rejected, H.J. Res. 372, the bill to increase the ceiling on the national debt to \$2,078,700,000,000. 131 Cong. Rec. S 12082 (daily ed.)¹. There were no hearings,

¹ All references to Volume 131 of the Congressional Record are to the daily edition.

nor even a committee mark-up or report on Gramm-Rudman, although by the time it was approved by the Senate on October 10, 1985, *see* 131 Cong. Rec. S 13114, there had been nine days of debate on it, with several more in each House before it became law².

As a result, the basic purpose of the Act and the reasons for its passage must be gleaned from the floor debates and the structure of the Act itself, rather than from committee reports or even statutory statements of findings and purposes, of which there are none. Even the conference report has little of relevance since it primarily contains explanations of specific provisions in the Act. In order to fully appreciate the forces that impelled Congress to act as it did, it would be useful to read all of the floor debates on September 25, October 3-5, and December 11 in the Senate, and November 1 and December 11 in the House. There are, however, certain themes which recur throughout the debates, and which explain the rationale behind Gramm-Rudman in a way which is not only lacking in the briefs of the appellants and the opinion of the district court, but which is vitally important to understanding the gravamen of plaintiffs' first constitutional challenge—that Congress cannot delegate its constitutional responsibility to determine how taxpayer monies are to be spent, in the way that it did here.

First, Congress believed that the ordinary legislative process

² After passing the Senate, H.J. Res. went to conference, and while that was proceeding, there were hearings in the House, the most relevant of which has been printed. *See* Hearing, *The Balanced Budget and Emergency Deficit Control Act of 1985*, Before a Subcommittee of the Committee on Government Operations, House of Representatives, 99th Cong., 1st Sess. (Oct. 17, 1985) ("House Hearings"). On November 1, 1985, the House passed its version of Gramm-Rudman, *see* 131 Cong. Rec. H 9615, and the Senate then responded with its amended proposal. *See* 131 Cong. Rec. S 14924 (Nov. 6, 1985). The matter then went to conference again, where an agreement was reached, and the final version was reported to both Houses. *See* H.R. Rep. No. 99-433, 99th Cong., 1st Sess. (1985), *reprinted in* 131 Cong. Rec. H 11684-717 (Dec. 10, 1985) ("Conf. Rpt."). This version was then approved by both Houses, 131 Cong. Rec. H 11903 (Dec. 11, 1985, appearing in Dec. 12 Cong. Rec.) and 131 Cong. Rec. S 17444 (Dec. 11, 1985), and on December 12, 1985, it was signed into law by President Reagan.

had failed to reduce the size of the budget. As Senators Gramm and Rudman explained it,

... we admit once again that the budget process has failed and that we have failed. 131 Cong. Rec. S 12082 (Sept. 25, 1985, remarks of Sen. Gramm).

The unfortunate fact, Mr. President, is that the political process generally and the budget process of the Federal Government has failed. . . . I will make no attempt to pinpoint blame for this failure; there is plenty to go around. But, it is clear that the status quo cannot be allowed to continue. 131 Cong. Rec. S 12085 (Sept. 25, 1985, remarks of Sen. Rudman).

Or, as one member of the House expressed the situation:

The proposal we have before us today is a [sic] admission of failure. Failure of the congressional budget process. Failure of budget discipline. Failure of the House of Representatives as an institution. 131 Cong. Rec. H 11881 (Dec. 11, 1985, remarks of Rep. Daub).

Similar expressions of frustration with the legislative process were made throughout the debates. See Addendum at 1a-2a.

Second, the legislative history is rife with congressional recognition that pressures from the public to increase spending for various programs were too strong for most members to resist and that they simply lacked the will or discipline to vote to reduce spending or increase taxes. Thus, as one Senator stated when the bill was introduced:

We know all too well that there are hundreds of special interest forces wanting us to spend money. The time has come to create a force which provides us with the discipline to say no. 131 Cong. Rec. S 12087 (Sept. 25, 1985, remarks of Sen. McConnell).

The same sentiment was echoed moments later by another of the bill's sponsors:

It is only political nearsightedness which makes it seem that Congress is somehow prevented, by those whom it represents, from serving the best interests of the represented. 131 Cong. Rec. S 12088 (Sept. 25, 1985, remarks of Sen. Cohen).

Or, as the former chairman of the House Budget Committee put it:

It is too bad that there is not enough political courage in this nation to cut the deficit without an artificial mechanism like Gramm-Rudman. In the absence of tough decisions, though, this conference agreement should have a positive effect. 131 Cong. Rec. H 11887 (Dec. 11, 1985, remarks of Rep. Jones).

See also Addendum at 2a-5a.

Thus, because Congress was unwilling to make the hard choices that have to be made to curb deficit spending, it searched for a new mechanism to demonstrate to the public its basic commitment to balance the budget. But it sought to accomplish this goal while continuing to allow members to approve spending for programs that, taken as a whole, would not reduce the deficit. Thus, as Senators Gramm and Rudman described the purpose of the bill:

This process, however, guarantees that action will be taken. It guarantees that we do not have the luxury of simply passing the buck to the American worker in terms of higher deficits. It means that we do not have the freedom to pass the burden of decisions not made onto the backs of our children and grandchildren. It means that a solution will occur. It does not dictate which solution. But it does dictate that the time has come for choosing, and that a

choice will have to be made. 131 Cong. Rec. S 12568 (Oct. 3, 1985, remarks of Sen. Gramm).

Mr. President, the purpose of our proposal is to establish an enforceable process which ensures there will be a balanced budget in fiscal year 1990. 131 Cong. Rec. S 12085 (Sept. 25, 1985, remarks of Sen. Rudman).

See also Addendum at 5a-7a.

Several aspects of this legislative background are important. No one suggested that the problem was caused by issues that were too technical in the sense that they required expertise not possessed by Congress. Nor was the problem that there were too many decisions to make, or that Congress did not have time to review the relevant factors before arriving at a proper determination. Nor was the reason for Gramm-Rudman that Congress had other issues that were of higher priority, and hence it preferred to delegate budget decisions to others. Instead, the only problem that the Gramm-Rudman delegation was designed to solve was the lack of legislative will. Indeed, the delegation under Gramm-Rudman does not relieve the Congress of any of its legislative burdens, since members will still vote on every appropriation and tax bill just as they have always done. How Gramm-Rudman proposes to reach the goal of a balanced budget, while enabling members to continue to avoid voting against funding for popular programs, is the subject of the next section of this brief.

2. STATUTORY FRAMEWORK

The goal of the Act is to reduce the size of the annual federal budget deficit from its otherwise anticipated level of \$200 billion or more for the foreseeable future, to zero by fiscal year 1991. Section 201(a) of the Act, adding new paragraph (7) to section 3 of the Budget Act, sets forth the annual steps for the decreases (*see* section 257(5)), and the Act creates a mechanism which is intended to ensure that the reductions in the deficit actually take place as planned.

Under the Budget Act, as amended by Gramm-Rudman, Congress passes an annual concurrent budget resolution by April 15, which is supposed to produce deficits no larger than the targets established by the Act. Those resolutions are not signed by the President, and thus they are only guidelines for the appropriations bills which actually determine the amount of spending, and hence the deficit. In order to make it difficult for Congress to exceed these limits, the Act makes it a point of order against a spending bill which exceeds the amount provided for that item in the concurrent resolution. See section 201 of the Act, *amending* section 302(f) of the Budget Act. J.A. 108.

Congress also recognized that even if the concurrent resolution shows a deficit meeting the statutory target, that does not automatically produce a deficit at that level. The first reason is that waivers of compliance with the concurrent resolution, while difficult to obtain, have all too often been granted, especially with changed circumstances. Second, and even more important, the amount of the anticipated deficit cannot be determined mathematically in advance simply by adding up the revenues and subtracting the authorized expenditures since there are a number of variables that affect both sides of the equation.

The difficulty in making the required estimate, and their central role in the budget process, can be seen from the President's *Budget of the United States Government, Fiscal Year 1986*, February 4, 1985 ("1986 Budget"). Chapter 3, entitled "Economic Assumptions and the Budget," contains twenty-five pages of text and charts which demonstrate the problems in making the various estimates and illustrate how essential it is that the forecasts be accurate. It also recognizes that changes in government programs (as surely will result from Gramm-Rudman) will themselves affect the economy and hence the deficit.

The clearest statement of the problem is on page 3-20 under the heading "Sensitivity of the Budget to Economic Assumptions":

Both receipts and outlays are strongly affected by changes in economic conditions. Budget estimates and pro-

jections, therefore, are a function of the economic assumptions upon which they are predicated, and are highly sensitive to changes in those assumptions.

The sensitivity of the budget aggregates to economic conditions seriously complicates budget planning because forecasting the economy inaccurately leads to forecasting the budget inaccurately, and economic forecasting is not an exact science.

That section also emphasizes the importance of assessing the combined effect of all economic variables, which further complicates the process. Although the section suggests that there are rules of thumb that can help determine the offsetting effects of associated changes, the Chapter as a whole makes it clear how necessarily imprecise and arbitrary the entire process is, a view seconded by CBO Director Rudolph Penner in his testimony on Gramm-Rudman. House Hearings at 156-57, 181.

Among the most important of these variables in predicting the state of the economy is interest rates. With the government now nearly \$2 trillion in debt, of which nearly \$200 billion will be new debt in fiscal 1986, a small change in the projected interest rate would result in a significant change in the deficit. On the revenue side, the amount of money collected is dependent on income earned, which, in turn, is keyed to the gross national product—a figure on which very knowledgeable individuals, often with no political ax to grind or position to espouse, disagree substantially.³ Similarly, the unemployment rate affects federal revenues because, with fewer people at work, there are less total earnings and hence less taxes paid by both individual wage earners and their employers. In addition, increased unemployment produces added expenses through greater unemployment compensation payments. Other imponderable but necessary adjustments are based on items such as the infla-

³ For two recent discussions of the difficulties of making this forecast, see R. Samuelson, "Educated Guesswork," *Washington Post*, January 1, 1986, F.1, cols. 1-2, and "Gloomy Data Making Economists Uncertain on Outlook for Growth," *New York Times*, March 17, 1986, A.1, cols. 4-5.

tion rate, the international trade deficit, and even such matters as how much the federal government spends for oil, which varies depending on the strength of OPEC in enforcing higher oil prices and the severity of the winter.

In short, determining budget deficits is an extremely complex matter, and it is hardly the equivalent of balancing a checkbook or even determining the annual income for a large conglomerate corporation. Moreover, these estimates have to be determined several months before the start of the fiscal year to which the spending limitations apply, making these predictions even more hazardous. Indeed, as the Comptroller General acknowledged in his first report issued under the Act, "[e]conomic indicators continue to follow the mixed pattern that has prevailed since mid-1984, suggesting considerable uncertainty in forecasting the economy." GAO Report of January 21, 1986, at 45.

In recognition of both the non-binding nature of the concurrent budget resolution and the need to take into account subsequent legislative and economic developments, the Act creates a mechanism which is designed to ensure that spending levels in fact meet the target deficits, even if Congress appropriates excessive funds for various programs, or provides insufficient revenues.⁴

After the concurrent resolution is approved in April, two agencies are assigned to review the estimates, to take into account newly available evidence and the effect of the appropriations legislation being enacted, and to make a determination as to whether the target will be met. Both entities—the Office of Management and Budget ("OMB") and the Congressional Budget Office—have long been deeply involved in the budget process, with the former in charge of assisting the President in the preparation of the budget that he sends to Congress, and keeping him apprised of subsequent developments, and the latter advising the budget committees and Congress generally on

⁴ The description which follows will deal with fiscal year 1987, which begins on October 1, 1986. At the conclusion of that discussion, the special rules applicable to fiscal year 1986 will be noted.

all matters relating to budget decisions. 2 U.S.C. § 602. These two offices, one a part of the executive branch and the other of the legislative branch, are required to issue a joint report by August 20 that evaluates the results of the legislation passed as of August 15 (by which time Congress is generally in recess). In it they are to analyze the previously passed spending bills and make certain assumptions about spending levels in areas in which Congress has not yet acted in order to estimate as precisely as possible the anticipated deficit for the forthcoming fiscal year. Section 251(a)(1).

The contents of the report are spelled out in detail in section 251 of the Act. A crucial determination to be made is whether, after factoring in all of the relevant data, the target deficit for the year will be met, and if not, whether the excess will be more than \$10 billion, which is the threshold for triggering the deficit reduction procedures in the Act. Congress also recognized that there would be differences of opinion between CBO and OMB and provided that, in such event, the report "shall average their differences," and "shall also indicate the amount initially proposed for each averaged item by each Director." Section 251(a)(5).⁵

If the two Directors determine that the target has been missed by \$10 billion or more, the report must specify how much of a reduction shall be made in each program and account.⁶ Although the job of allocating reductions is assigned to the Directors, the statute gives them almost no discretion in how these reductions are accomplished. First, the Act requires equal reductions from defense and non-defense programs. To achieve this, it eliminates all automatic cost-of-living adjustments mandated by statute, or reduces them to the point where the savings would eliminate one half of the excess deficit. To obtain the other half (or if eliminating the automatic increases is not sufficient to provide half of the savings, then that additional deficiency also), the re-

⁵ However, as CBO Director Penner testified, there are substantial problems even with so seemingly simple a matter as averaging. House Hearings at 183, 192.

⁶ There is no provision under which taxes can be raised in order to eliminate the excess deficit.

maintaining parts of the budget, other than items such as Social Security, programs for low income individuals, and a few others which are exempt in whole or in part, are reduced by a uniform percentage so that the deficit meets the statutory target for that year. The amount of that percentage is, of course, entirely dependent on the various estimates discussed above, to which the spending and revenue figures in the budget are keyed.

After the report is issued, the process accelerates rapidly, reflecting the fact that from then on the roles of the others who are designated by the Act to perform certain functions are in fact quite limited. The version of Gramm-Rudman initially passed by the Senate would have sent the joint OMB-CBO report directly to the President. See 131 Cong. Rec. S 13096, § (d)(1) (Oct. 10, 1985). However, because of doubts about the constitutionality of that process due to the involvement of CBO, an agency of Congress, the Senate proposed, and the House subsequently agreed, to have the Comptroller General, who heads the General Accounting Office ("GAO"), issue the final deficit reduction report. See 131 Cong. Rec. S 14911 (Nov. 6, 1985). This was done even though the question of whether the GAO could constitutionally carry out executive functions, because of his substantial allegiance to Congress, was currently the subject of litigation in the Third Circuit. *Ameron, Inc. v. U.S. Army Corps of Engineers*, 607 F. Supp. 962 (D.N.J. 1985), Nos. 85-5226 and 85-5377 (decided March 27, 1986).

There is another aspect of the role of the GAO in the spending reduction process under the Act which is important, particularly with regard to the argument made in Point II *infra*. There we assert that, because the Director of CBO is admittedly an officer of the legislative branch, and he has a substantive rather than purely advisory role in the process, there is a congressional sharing in the administration of the Act between CBO and GAO, which is itself a violation of separation of powers.

The structure of the Act virtually requires a sharing of responsibilities since, under section 251(b)(1), the Comptroller General is given only five days (which in the first two cycles include both a Saturday and a Sunday) to review the Directors' report, in-

cluding examining the methodology and disagreements between them, and to issue a final report to the President which "shall explain fully any differences between the contents of such report and the report of the Directors." Section 251(b)(2). Thus, unless the Comptroller General works closely with OMB and CBO in developing their report, he will have little choice other than to follow their joint estimates and adopt the average of their positions if they differ.

In the district court, in response to the claim by the congressional appellees that the Comptroller General would be little more than a rubber stamp, appellant Bowsheer submitted an affidavit in which he disputed that characterization. He pointed to the plans that he had set in motion to handle GAO's responsibilities under the Act. Included among these were a meeting he held with CBO and OMB "to arrange for cooperation between the staffs of GAO, OMB, and CBO . . . to assure that GAO will understand the assumptions used and the theories underlying the report of the Directors [which] will facilitate our review of that report and preparation of my report for submission to the President. . . ." J.A. 23-24, ¶ 8. His affidavit then stated that there were "frequent discussions between the staff of GAO and those of CBO and OMB on a variety of procedural, technical and legal issues." J.A. 24, ¶ 9. He further noted that he anticipated "the cooperation of OMB and CBO" in a variety of respects, including the advance submission to GAO of the data to be used by the Directors in preparing their report. *Id.* In short, while there are references in the affidavit to the independence with which GAO will undertake its duties, the plain import of the submission is that, in order to avoid being a rubber stamp for the Directors, the Comptroller General will work closely with them so that, while the ultimate report will be his, the result will be based on a cooperative effort that will, in every realistic sense, be a joint effort of the three offices. In fact, the Comptroller General's report for the 1986 fiscal year acknowledged that it was based in part on "in-depth discussions with officials and staff of OMB, CBO, and the departments and agencies." GAO Report at 3.

After the Comptroller General's report is sent to the President on August 25th, the President must issue a directive, known as a sequestration order, by September 1, carrying out the reductions set forth in the report. Unless Congress passes alternative reductions by October 1 that would also meet the target, the sequestration order takes effect. As originally introduced, Gramm-Rudman would have given the President considerable discretion to decide which programs to cut within each budget account. Most of that discretion was removed on the Senate floor as a result of an amendment offered by Senator Levin, *see* 131 Cong. Rec. S 12944 (Oct. 9, 1985), and the remainder was eliminated by the House and the Conference. Accordingly, the President has virtually no discretion in choosing among programs, and appellees do not challenge the constitutionality of the Act on the grounds of excessive delegation to him. However, while eliminating the President's discretion, the conferees added section 274(h), which provides for unlimited discretion in another direction: it makes the "economic data, assumptions, and methodologies" used by the Comptroller General (*i.e.* those also used by the Directors) non-reviewable "in any judicial or administrative proceeding."

The Act also recognizes that Congress often acts on spending matters at the last minute, and so it provides for a second round of estimates which are to be made by the Directors on October 5, and by the Comptroller General on October 10, with the Presidential order, issued on October 15, to become effective immediately. Other than the timing, the reports and the sequestration order are subject to the same requirements as are the earlier ones.

The result of all of this is that, no matter what spending levels Congress or the President may approve, those levels will be reduced if the report of the Directors, as passed upon by the Comptroller General, determines that the stated deficit targets in the Act will not be met by \$10 billion or more. Furthermore, the reductions required by the Act not only change the law on spending for the fiscal year in which the reductions occur, but under section 256(a)(1), cost of living increases that are not

allowed to take effect because of a sequestration order "shall not be taken into account for purposes of determining any automatic spending increase during any fiscal year thereafter." And section 256(a)(2) explicitly provides that any budget or other spending authority that is sequestered, except for money in special or trust funds, "is permanently cancelled."

The process actually used for fiscal 1986 was the same in principle, but adjusted slightly because that fiscal year began on October 1, 1985, and the Act was not signed into law until December 12, 1985. The first difference is that there was only one report by the Directors, due January 15, with the Comptroller General's report due January 21. Second, there is no \$10 billion cushion by which the projected deficit may exceed the target before cuts are required. *See* section 251(a)(3)(A)(i). Third, the amount of the reduction required was prorated on a 7/12th basis starting March 1, 1986, and the total reduction could not exceed \$11.7 billion. *See* section 251(a)(3)(A)(ii). Finally, the President was given a small amount of discretion within the defense account, only for fiscal 1986, to allocate reductions between personnel and other elements of the defense budget. *See* section 252(a)(3)(D).

There are numerous other technical provisions in the Act, but there is only one other provision which bears on the issues presented in this litigation. Unlike many cases in which a statute is declared unconstitutional, and the Court must decide what remains of the law, Congress has eliminated the question of severability here by including a specific back-up provision in section 274(f). Under that provision, if any aspect of the primary deficit reduction mechanism is declared invalid, a fall-back mechanism goes into effect, under which the report of the Directors (not the version approved by the Comptroller General) goes to a special joint budget committee of Congress, which then reports to both Houses, which will consider the matter on an expedited basis. Since the reductions described in the report will go into effect only if two Houses and the President concur (or both Houses vote to override his veto), there is no question that the fall-back is constitutional.

vote we will cast . . .” is the one in favor of the Act. 131 Cong. Rec. S17427 (Dec. 11, 1985). Indeed, Senator Gramm, a co-author of the Act, acknowledged that the hard choices of budget balancing were yet to be made when he said that the automatic mechanism was intended as a “disciplining agent” which would only take effect “if we fail to do our job.” *Id.* at S17389 (Dec. 11, 1985). He had earlier explained that the point of the mechanism was to “make Congress make hard decisions . . .” *Id.* at S12962 (Oct. 9, 1985).

But, in addition to showing that the Act fell short of grappling with the difficult choices of budget policy, the legislative debates underscored Congress’ unabashed wish to avoid political accountability for those choices through the shield of the automatic mechanism, a scheme that was strongly criticized by the Act’s opponents. Senator Mathias urged that the Act embodied a process that

. . . is mechanical, it is preset; it is mindless, and no one need accept blame. This [Act] searches for a way to evade the hard choices that deficit reduction demands. It strives for a way to reach the goal without taking responsibility. It represents budget balancing by anonymous consent.

Id. at S14919 (Nov. 6, 1985).

Representative Gray similarly stated that the Act “encourages Congress to avoid hard decisions, secure in the knowledge that a sequestration of funds is to come that will do it instead.” *Id.* at H11889 (Dec. 11, 1985). Rep. Hartnett declared that “if Webster’s could define Gramm/Rudman it would be something like this: an abdication of congressional responsibility, a loophole through which Congressman can slide.” (*sic*) *Id.* at H11889 (Dec. 11, 1985). Finally, Rep. Waxman lamented that, in adopting the Act, Congress had established Government “by automatic pilot . . . And when the ax falls and when our constituents come to us . . . the answer from the President and the Congress will be, I’m sorry, I am not responsible. Your misery is caused by a budget process that is beyond

our control. It is out of our hands." *Id.* at H11881 (Dec. 11, 1985).¹¹ Finally, Senator Kennedy, a supporter of Gramm-Rudman, recognized that the Act reflected Congress' inability to meet its responsibilities when he observed that making automatic "across-the-board cuts" was the only real avenue to achieve a balanced budget because "Congress itself seems to lack any will or strategy to limit and then eliminate the deficit under present procedures." *Id.* at S12961 (Oct. 9, 1985).

Hence, what the legislative debates starkly disclose is an "obvious example of Congress simply avoiding a choice which was both fundamental . . . and yet politically so divisive that the necessary decision or compromise was difficult, if not impossible, to hammer out in the legislative forge." *Industrial Union Dept. v. American Petroleum Inst.*, 448 U.S. 607, 687 (1980) (Rehnquist, J., concurring). But, as we have maintained, it is precisely these fundamental budget choices that our Constitution requires be made by accountable, elected officials under our republican form of government. When such choices are to be made "the buck stops with Congress and the President, insofar as he exercises his constitutional role in the legislative process." *Id.* What this Act provides should Congress itself fail to legislate to meet its deficit targets is a mechanism for the surrender of policy making authority through the automatic reduction process.¹² In the absence of congressional confrontation of the necessary choices of budget-balancing, the Act creates a policy vacuum which is permitted to be filled by the "unthinking, bloodless" determinations of the automatic mechanism.¹³

¹¹ See also, remarks of Reps. Conte, Garcia, Rodino, Hyde and Levine at 131 Cong. Rec. H11885-11890 (Dec. 11, 1985).

¹² As Judge Wright has observed: "An argument for letting the experts decide when the people's representatives are uncertain or cannot agree is an argument for paternalism and against democracy." Wright, *Book Review*, *supra*, 81 Yale L.J. at 585.

¹³ 131 Cong. Rec. H11885 (Dec. 11, 1985) (remarks of Rep. Hyde).

b. When the automatic trigger operates, as it did in the current fiscal year, an administrative spending reduction process, substituting for previously enacted laws, automatically takes effect. That this mechanism represents a surrender of the "essentials of the legislative function" is demonstrated by this Court's analysis in *INS v. Chadha*, where this Court defined power of a "legislative character." 462 U.S. at 952. In *Chadha*, the Court determined that the legislative veto device must be struck down because it represented the exercise of legislative power without adherence to Article I's lawmaking requirements. Crucial to the Court's determination that the veto was essentially legislative in nature was the fact that the veto "had the purpose and effect of altering the legal rights, duties, and relations of persons . . . outside the Legislative Branch". *Ibid.* In addition, the veto's "legislative character" was "confirmed by the character of the Congressional action it supplants." *Ibid.*

By these standards, the administrative determinations that result in budget reductions under the automatic mechanism are legislative actions. When the automatic mechanism comes into play, previously enacted appropriations statutes are nullified and supplanted by the determinations of administrators. In effect, the Act authorizes the President, through his issuance of a sequestration order, to undo duly enacted statutes with something that is less than a law.¹⁴ When it takes effect, that order, as a practical matter, constitutes automatic substitute legislation which directly alters the legal rights and obligations of persons just as a duly passed appropriations law would. In sum, by giving away, in its most basic sense, fundamental lawmaking power, Congress has failed to exercise for itself the essentials of the legislative function.

c. As seen, many legislators agreed with our view that this Act is an unprecedented abdication of Congressional

¹⁴ See letter of Rep. Rodino, quoted in 131 Cong. Rec. H9607 (Nov. 1, 1985).

authority.¹⁵ Supporters countered that this bill would bring "discipline" to the budget problem because the spectre of draconian cuts under the automatic trigger would force Congress and the President to make the "hard decisions." *See, e.g.*, remarks of Sen. Gramm, *id.* at S12962 (Oct. 9, 1985) and S17389 (Dec. 11, 1985).¹⁶

If Congress had simply reserved the necessary budget choices for another day, no delegation would occur and no constitutional issue arise. But the heart and sole reason for this Act is its automatic trigger device. The Act is completely predicated on the trigger being pulled and accomplishing the desired goals, as it has been pulled in the current fiscal year. As Senator Heinz aptly put it, the device is Congress' way of saying, "[s]top me before I kill again." 131 Cong. Rec. S12973 (Oct. 9, 1985).

Moreover, although many of the Act's supporters depicted the automatic trigger mechanism as a "club" that would force Congress to do its job, there was also a clear recognition that instead of acting as a "disciplinary agent," the trigger could prevent responsible budget cutting. As a colloquy among Senators Stevens, Packwood, and Domenici (the latter two key supporters of the bill) illustrates, a concern existed that the automatic trigger would actually be a disincentive for Members to make the hard budget choices.

Senators Stevens' questions focused on the problem of the so-called "double hit" that would befall those legislative committees which struggle during the appropriations process responsibly to reduce program spending. He pointed to the hypothetical situation of a defense appropriations committee deciding to decrease its spending

¹⁵ *See, e.g.*, remarks of Rep. Levine, 131 Cong. Rec. H11890 (Dec. 11, 1985), remarks of Rep. Rodino, *id.* at H9607 (Nov. 1, 1985), and remarks of Sens. Hatfield, Bumpers, Hart, DeConcini, Lautenberg, and Byrd, *id.* at S12966 (Oct. 9, 1985), S13107, S13092, S13108 (Oct. 10, 1985), S14917 (Nov. 6, 1985), S17441 (Dec. 11, 1985), respectively.

¹⁶ *See also, e.g.*, remarks of Sens. Hollings, *id.* at S17390 (Dec. 11, 1985), and Packwood, *id.* at S17430 (Dec. 11, 1985).

authorization by a significant amount, only to be hit with yet additional cuts if the fixed percentage reductions of the automatic mechanism were triggered. As he explained, if the committee successfully insisted that the Congress fund its programs to the maximum and then had to endure the automatic cuts, its programs would clearly fare better than if it had to absorb the double hit. 131 Cong. Rec. S17429 (Dec. 11, 1985).

Senator Packwood, a staunch supporter of the Act, admitted that Senator Stevens had "put his finger on a genuine problem . . . to which I do not have an answer, except we are all in the same boat together." *Id.* at S17430. Senator Domenici offered that it was unlikely that any programs would have to absorb disproportionate double hits because committees would refuse to make cuts unless they saw others doing the same. *Id.* at S17431. Senator Stevens replied that Senator Domenici "just answered my question. That is what I was afraid would happen. People will sit around and do nothing." *Ibid.*

The significance of the colloquy is obvious: rather than acting as a "club," the automatic mechanism is likely to have the opposite effect. And when the automatic mechanism does take effect, as it already has once, it will mean, as even Senator Gramm candidly acknowledged, that Congress failed again to fulfill its legislative responsibilities. *Id.* at S17389 (Dec. 11, 1985).

Finally, it should be noted that, even if this Act were magically to provide the "backbone transplant" to Congress that sponsoring Senator Rudman hoped for,¹⁷ the Act is structured so as to make it virtually impossible to complete a responsible budget package. Any party necessary to a compromise that believes its interests would be better served by automatic sequestering can refuse to agree, and thereby guarantee that sequester will take place.¹⁸ For example, if the Congress decides that a tax

¹⁷ 131 Cong. Rec. S12962 (Oct. 9, 1985).

¹⁸ Remarks of Sens. Gore, 131 Cong. Rec. S12900 (Oct. 8, 1985); Riegle, *id.* at S17410 (Dec. 11, 1985); Lautenberg, *id.* at S17435 (Dec. 11, 1985).

increase is necessary to reach the deficit target, but the President disagrees and views automatic sequester as preferable, he need only veto the tax increase. Automatic reductions would then occur in contravention of the majority will in Congress.

In sum, Congress and the President expected that the automatic mechanism would in fact function and relieve them of responsibility; indeed, the device provides strong disincentive to reaching any agreement on the necessary legislative choices, and implements the decisions of non-legislators when agreement cannot be reached.

2. The Act Provides Insufficient Standards to Guide the Administrators in the Making of the Critical Budget Deficit Projections Which Ultimately Form the Basis of an Automatically Enacted Federal Spending Law.

As shown, under this Act statutes are re-written by non-legislators. A vital part of exercising the essentials of legislative power when broad power is delegated is that Congress fulfill its responsibilities by providing adequate standards to confine the discretion vested in the Act's administrators. As this Court has instructed—in a statement that underscores the delegation doctrine's key principle of ensuring accountability in decisionmaking—the critical inquiry is whether there is a standard that “sufficiently marks the field within which the Administrator is to act so that it may be known whether he has kept within it in compliance with the legislative will.” *Yakus*, 321 U.S. at 425. Though the district court failed to heed its own observation, it correctly stated that where the scope of the delegated power grows broad, the standards governing it “must be correspondingly more precise” (J.A. 45) if the delegation is to be meaningfully confined. We believe that the Act's delegation is fatally defective because it gives its administrators unbridled discretion in making the pivotal budget deficit projections which ultimately form the bases of an automatically enacted appropriations law for the entire federal government.

a. The unharnessed authority that the Act confers on the administrators is revealed by a few salient facts. The Act's "automatic" budget cuts take place upon the administrative prediction that a deficit exceeding the target amount by more than 10 billion dollars will occur.¹⁹ Although the administrators are given instructions on how to estimate spending levels where appropriations have not yet been made (more fully described *infra* at 24-25), they are given no instructions as to how to determine the key economic conditions that form the bases of any budget deficit estimate. The delegation flaw in this scheme rests in the entirely open-ended discretion of the administrators to determine the projected deficit. This determination is pivotal, for it ultimately dictates whether and in what amount spending must be reduced to achieve the deficit target. Yet, one searches in vain for *any* statutory guidance regarding the making of these projections. Indeed, the Act fails even to tell *what* determinations are required to arrive at the deficit estimates much less prescribe *how* those determinations are to be made.

Thus, estimating the federal government's future revenues and outlays is left entirely in the administrators'

¹⁹ The Directors of OMB and CBO are instructed to estimate the "budget base levels of total revenues and budget outlays" for the upcoming fiscal year. Sec. 251(a)(2); J.A. 108-110. The projected deficit is then computed by figuring "the amount by which total budget outlays for such fiscal year exceed total revenues" for that year. Sections 257(4), 201(a)(1); J.A. 161, 103-104. If the estimated deficit exceeds the target by 10 billion dollars or more, the Directors must identify spending reductions as specified by the Act. Sections 251(a)(3), 255, 256 and 257; J.A. 110, 114, 143-161. The Directors then jointly report their conclusions to the Comptroller General who "with due regard for the data, assumptions and methodologies" used by the Directors issues his own report making the same kind of estimates and determinations found in the Directors' report. In the absence of appropriations legislation meeting the deficit targets, the President ultimately must issue an order making the spending cuts specified in the Comptroller General's report. Sec. 252(b)(1)-(3); J.A. 116-122.

discretion. Those estimates are, as suggested, totally dependent upon assumptions about general economic conditions. Among the economic variables affecting government spending and revenues are interest rates (which affect, among other things, payment on the national debt), inflation, the unemployment rate (which influences both the amount of income tax collected and the amount of unemployment compensation paid), the international trade deficit, the strength of the dollar, the gross national product, and the price of oil. Obviously, any computation that must consider all of these variables—assumptions about which experts routinely disagree—is virtually sheer speculation. No matter how fully informed the experts are, unpredictable events occur which affect the deficit. Thus, even when experts agree, they may all be wrong if the price of oil rises dramatically or international conflict breaks out.

The highly conjectural nature of economic forecasting and its direct effect on the budget estimates required by the Act were frankly described by Dr. Rudolph Penner, Director of CBO, during hearings on Gramm-Rudman:

Given the record of economists, it will not be difficult to convince anyone that economic forecasting is a very uncertain art. Reasonable men and women can differ widely about what the future holds, and even if there is agreement on an economic forecast, there is an added layer of uncertainty involved in translating that forecast into an estimate of budget totals

Hearings on H.J. Res. 372 Before the Subcomm. on Legislation and National Security of the House Comm. on Govt. Operations, 99th Cong., 1st Sess., 156-157 (1985). Underscoring that the problem was not forecasting itself, but giving the forecasts automatic effect, Dr. Penner stated:

It is hard to think of other instances where unelected officials have such power to do good or evil . . . I think the really basic problem is one of linking budgetary policies that should be determined by

elected representatives to the inherently uncertain forecasts of technicians.

*Ibid.*²⁰

In sum, as the district court stated, the standard guiding delegated power must grow correspondingly more precise as the scope of delegated authority increases; therefore, this delegation to estimate the federal deficit, which lies at the heart of the automatic reduction mechanism, is plainly inadequately guided. The nature of its impact could hardly be more far-reaching; it serves as the base determination on which the amount of across-the-board federal spending for a particular year is calculated and becomes law through the automatic mechanism. Yet the Act gives the administrators free rein essentially to make whatever kind of assumptions they wish in estimating the deficit. In predicting the deficit, the administrators are in fact deciding whether automatic cuts will take place and in what degree. How such a delegation can be viewed as "canalized within banks that keep it from overflowing," *A.L.A. Schechter*, 295 U.S. at 551 (Cardozo, J., concurring), is hard to fathom.

b. The district court identified three reasons to support its conclusion that the Act contained "constitutionally adequate legislated standards." J.A. 48. First, it observed that the Act specifies the assumptions to be made by the administrators in computing the budget base. However, as noted above, these directions provide guidance only to cover areas where Congress has not yet

²⁰ Senator Moynihan, an opponent of the Act, described the tying of budget making to economic forecasting as "mad scientism" which the Act makes "the engine of fiscal policy." 131 Cong. Rec. S14906-07 (Nov. 6, 1985). He observed that "[t]his entire machine for deficit reduction rests on our ability to forecast increases or decreases in the gross national product and the deficit. And that we cannot do with any semblance of confidence." *Id.* at S14905. He referred to Dr. Penner's testimony that "any forecast of GNP a year ahead that is off by no more than 1 percentage point [is] an excellent forecast," but appropriately noted that when growth is projected at 4 percentage points, "an error of 1 percentage point is obviously sizable." *Ibid.*

acted on appropriations measures for the coming year. For example, they are directed to assume "the continuation of current law in the case of revenues and spending authority." Section 251(a)(6)(A); J.A. 115-116. They are to assume "appropriations equal to the prior year's appropriations . . .," except where an annual appropriation or continuing resolution appropriation has already been enacted. Section 251(a)(6)(B); J.A. 116. In addition, they must assume that expiring revenue and spending laws will expire. Section 251(a)(6)(C); J.A. 116.

But these assumptions are the easy ones; they comprise only a few of the many that the administrators must make in estimating the base levels of outlays and revenues. The court below simply ignored that critical assumptions about economic variables must also be made, and, as to these determinations, the Act furnishes no guidance or limitation.

The district court also maintained that the Act confined administrative discretion by defining such terms as "budget outlays," "budget authority" and "deficit." J.A. 49. But again these definitions fail to instruct the administrators even generally as to what they should do in factoring economic conditions into their budget predictions.²¹

Finally, the court asserted that the required assumptions and definitions were guided by "years of administrative and congressional experience in making similar

²¹ Among the guiding definitions cited by the district court was that for "real economic growth." J.A. 49. But this definition does not help cure the defect of which we complain because it does not apply to the administrators' estimates of budget deficits. The Act requires a forecast of real economic growth for a separate reason: to forewarn Congress of any coming recession, in which event special provisions of the Act come into play. See Sections 251(a)(1)(C), 254(a), 257(6); J.A. 109, 134-139 and 161 respectively. To the extent real economic growth is considered in calculating the deficit estimates, that projection is obviously only one of many the administrators must assess; as to those other variables the Act gives no guidance.

economic projections and calculations . . .” J.A. 50. To be sure, the cases do suggest that the court may look to historical context and the “common lore” (*Amalgamated Meat Cutters*, 337 F.Supp. at 748) as evidence that Congress has established the bounds within which the Act’s administrators must stay. The problem with applying such an approach here is that the “common lore” only underscores the absence of any meaningful norms that confine the administrators’ budget forecasting. On the contrary, the district court’s claim that “the economic calculation standards, which might seem vague and confusing to laymen, will have more precise meaning to officials accustomed to making such determinations” (J.A. 50) is belied by the almost universal recognition that forecasting involves complex calculations about which even the experts sharply disagree.²²

c. Finally, the court below viewed the Act as nothing more than “contingent legislation” (J.A. 46), no different from other statutory schemes approved by this Court in such cases as *The Cargo of the Brig Aurora v. United States*, 11 U.S. (7 Cranch) 382 (1812); *Field v. Clark*, *supra*; *United States v. Rock Royal Co-operative*, 307

²² The folly—and abdication of congressional responsibility—of tying federal spending levels to economic forecasts is underscored by economists’ characterizations of such prognostications. Emile van Lennep, who served as head of the Organization for Economic Cooperation and Development, observed that: “Economic forecasting is necessary, but it cannot and should not be used as a reliable guide for economic policies.” *When Economic Forecasters Miss the Target*, U.S. News & World Report 80 (Nov. 12, 1984). Harvard economics Prof. Dale Jorgenson has remarked, “I wish I could say economists are powerful thinkers and can tell what’s going to happen . . . But they haven’t the slightest idea and never had.” *What Good Are Economists?*, Newsweek 61 (Feb. 4, 1985). Martin Feldstein, another Harvard economist has said: “One of the great mistakes of the past 30 years of economic policy has been an excessive belief in the ability to forecast.” *The Forecasters Flunk*, Time 42 (Aug. 27, 1984). Finally, President Reagan commented not long ago: “Those [economic] projections, frankly, I pay no attention to them.” *What Good Are Economists?*, *supra* at 60.

U.S. 533 (1939), and *Curriu v. Wallace*, 306 U.S. 1 (1939). The district court asserted that Congress has simply provided that the "full effectiveness of all appropriations legislation" will be contingent upon the administrative determination that the legislation has met the specified budget deficit targets. J.A. 46. The court urged that the delegated authority "does not differ in kind from that approved in prior cases." *Ibid.* We disagree.

The material difference between the typical "contingency" statute and this one is found in the nature of the contingencies themselves. Generally, the power to ascertain whether a contingency has occurred has been delegated to administrators. The delegate typically reviews past events and decides whether the condition Congress specified has occurred. In this case, however, the administrators have the sole power to predict what future conditions will be, and their predictions automatically determine what the law will be. In other words, the delegate is deciding whether the contingency *will* occur, not determining ascertainable facts.²³

For example, in *The Brig Aurora*, the Court examined whether a statute gave the President too much discretion in authorizing him to lift a trade embargo against Britain and France if he found that both had ceased violating "the neutral commerce of the United States." 11 U.S. (7 Cranch) at 383-84, 86. The Court concluded that it did not, because the power delegated was confined to fact-finding and involved only a limited exercise of discre-

²³ Similarly, and contrary to the district court, we believe the Act differs materially from statutes containing provisions contingent, for example, on the consumer price index (CPI). The scope of the power delegated in such statutes is clearly more confined because it involves what are essentially adjustments to spending decisions legislatively made. Determination of the CPI is basically a fact-finding exercise which involves a measurement of past economic conditions pursuant to a formula that is at least well established. Such calculations simply cannot be fairly equated with the making of unguided, highly speculative projections—involving assumptions upon which few can agree—that then serve as the foundation for a government-wide spending policy.

tion. Similarly, in *Field v. Clark*, Congress authorized the President to raise tariffs and suspend trade with a foreign nation if he determined that a duty imposed by that country on American goods was "reciprocally unequal and unreasonable." 143 U.S. at 693. Again, the Court upheld the delegation, stating that it could not be said that "when the President ascertained the existence of a particular fact . . . he exercised the function of making laws." *Id.* at 693. These cases involve statutory delegations clearly different from that made by this Act. First, in the "contingent legislation" cases, Congress enacted a law, and instructed the President to determine when particular provisions of that law should take effect. Gramm-Rudman, however, is unique: it allows administrators effectively to supplant other duly enacted statutes and, indeed, it has a continuing effect on future appropriations laws by ultimately making them subject to administrative determinations. In addition, the nature of the executive determinations in those cases related to past events, not, as here, to predicting future events. By pegging operation of those laws to "ascertainable" facts or concrete events, Congress had adequately confined the exercise of the delegated discretion.²⁴

Because the administrators of this Act are required to predict a highly complex, future contingency, the result is necessarily extremely speculative. The tying of automatic, substitute legislation to such speculation can hardly be justified on the basis of "fact finding" cases.

3. *The Rationale of "Governmental Necessity" Cannot Justify the Act's Delegation.*

In examining broad delegations, this Court has often considered whether they have been "born of the necessi-

²⁴ The Court's decisions in *Currin v. Wallace*, 306 U.S. 1 (1939) and *United States v. Rock Royal Co-operative*, 307 U.S. 533 (1939) likewise concern executive fact-finding of a relatively limited nature, rather than prediction of future events. In the former, the fact to be determined was the result of a referendum; in the latter, a finding that a price adjustment was needed to sustain farmers' purchasing power at a level equivalent to their purchasing power during a statutorily prescribed base period.

ties of the occasion." *A.L.A. Schechter*, 295 U.S. at 552 (Cardozo, J., concurring). Considerations of flexibility and practicality have been cited as justifying delegations, particularly where the matter legislated is "sufficiently technical, the ground to be covered sufficiently large, and the Members of Congress themselves not necessarily expert . . ." *Industrial Union Dept. v. API*, 448 U.S. at 675 (Rehnquist, J., concurring).

Indeed, the so-called principle of governmental necessity played an important role in the upholding of two statutes making extremely broad delegations. In *Yakus v. United States*, *supra*, the Court sustained a delegation giving an administrator broad power "to promulgate regulations fixing prices of commodities." 321 U.S. at 420. In upholding this war time measure, the Court declared that the Constitution "does not demand the impossible or the impracticable." *Id.* at 424. Similarly, in *Amalgamated Meat Cutters*, *supra*, a three-judge district court upheld a delegation to the President to set wage and price controls and cited, among other reasons, "the practicalities and necessities of the public interest." 337 F. Supp. at 752.

This case presents, however, a situation materially different from those in *Yakus* and *Amalgamated Meatcutters* and, indeed, from any other case, because the delegation here was not made out of "necessity" as that term has been previously used. The power granted to the administrators under the Act—that is, the power to set spending levels—was not ceded because what was required was too technical, complex, or time consuming for Congress to accomplish. Indeed, Congress in the past has managed to make these very budget decisions every year and, under the Act, will at least continue to go through the motions of passing appropriations measures in the future. Stated plainly, the necessity that impelled the delegation made by this Act was, as our earlier discussion of the debates established, the desire to avoid accountability for the divisive spending reductions which

Congress has perceived are required, but the nature of which Congress could not bring itself to specify.

It is this congressional effort to evade responsibility that makes the Act constitutionally unacceptable. As Senator Byrd put it, the "Founding Fathers never envisioned a government bound by a formula, and yet that is exactly what [the Act] would impose on the country." 131 Cong. Rec. S17442 (Dec. 11, 1985).²⁵

If an Act so conceived is allowed to stand, the delegation doctrine's underlying objective—namely, to ensure that "important choices of social policy are made by Congress, the branch of our Government most responsive to the popular will"—will be rendered meaningless.²⁶ Congress would then be able to shield itself—for the first time with the blessing of this Court—from accountability through the "necessity" of political expediency.²⁷ Such a result would be flatly at odds with the Court's recent teaching in *Chadha* that the fact that a given "procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government . . ." 462 U.S. at 944.

²⁵ See, e.g., *The Federalist*, No. 51 at 322 (J. Madison) (McLean, ed., New American Library, 1961) ("In framing a government which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to controul the governed; and in the next place oblige it to controul itself." (Emphasis added.))

²⁶ *Industrial Union Dept. v. American Petroleum Inst.*, 448 U.S. at 685.

²⁷ See J. Ely, *Democracy and Distrust*, *supra*, at 137: "That legislators often find it convenient to escape accountability is precisely the reason for a nondelegation doctrine. Were it to turn out that legislators forced to govern wouldn't have the courage to do so energetically, that would often be too bad . . . but at least it would be our system."

4. *The Unchecked Nature of the Discretion Vested in the Act's Administrators Is Underscored by the Preclusion of Judicial Review of the Crucial Budget Projections that Determine the Magnitude of Required Reductions in Federal Spending.*

The availability of judicial review has long been viewed as a principal safeguard against overbroad delegations of legislative power. As this Court stated in *Yakus*, such review plays a critical role in ascertaining "whether the will of Congress has been obeyed" and ensuring that a statute's administrator acts "in compliance with the legislative will." 321 U.S. at 425. The importance of judicial review as a means of keeping a delegation within proper bounds was emphasized recently in *Chadha* where the Court observed that a delegation "is always subject to check by the terms of the legislation that authorized it; and if that authority is exceeded, it is open to judicial review . . ." 462 U.S. 953-954, n.16. Indeed, in the three cases cited by the district court as examples of the upholding of delegations similar to the Act in their breadth (J.A. 45), the availability of judicial review was a critical element in sustaining the statutes under challenge. See *Yakus v. United States*, 321 U.S. at 425; *Bowles v. Willingham*, 321 U.S. 503, 515-516 (1944); and *Amalgamated Meat Cutters*, 337 F.Supp. at 746, 755, 757, 759. In short, the cases demonstrate that the opportunity for judicial review of administrative action, while not an absolute litmus test, is at least a highly significant factor in measuring whether a particular delegation is sufficiently checked.

Here, in sharp contrast to other cases involving similar sweeping delegations, the pivotal determinations that trigger the operation of the automatic spending reduction mechanism are entirely insulated from judicial review. Specifically, section 274(h) of the Act provides that the Comptroller General's calculation of "the base levels of total revenues and total budget outlays . . . shall not be subject to review in any judicial or administrative proceeding." J.A. 166. Hence it is clear that the discre-

tion vested in the Act's administrators as to the key budget projection determinations is completely unbridled. It is checked neither by any legislative standards nor by scrutiny from the courts.²⁸

We are not contending, however, contrary to the district court's suggestion, that judicial review of the administrators' determinations could save this delegation. J.A. 53. We recognize that the kinds of complex, technical forecasting determinations involved in budget deficit projections are singularly unsuited for court review. Clearly, the courts are inherently incapable of assessing the validity of estimates involving, for example, the impact of inflation or interest rates on future government expenditures or revenues.

The absence of judicial review is nonetheless relevant because it further underscores just how uncontrolled the administrators are in their power to establish the range of federal spending by dictating the amounts of budget cuts that must occur. Stated another way, what follows from the impracticability of judicial review of the key budget projections is not that Congress can therefore give a blank check to the Act's administrators to make federal spending determinations. What follows is that meaningful accountability in the budget setting process can only come from direct congressional involvement in the complex and policy-laden budget determinations that are finally adopted as law.

* * * * *

The foregoing demonstrates that if accountability of elected officials is to have any meaning in the context of the delegation doctrine, then this Act cannot stand. We have seen, through the words of the Act's own architects,

²⁸ As the district court correctly observed, the Act does permit review of certain specified actions of its administrators. J.A. 52. *See, e.g.*, Section 274(d) (J.A. 164) (allowing review of sequestration orders to ensure their compliance with statutory requirements). But the fact remains that the key determinations which ultimately define the contours of budget reductions are immune from judicial oversight.

that Gramm-Rudman was specifically designed, unlike any other statute reviewed by this Court for delegation defects, to overcome political paralysis and allow achievement of a balanced budget through an anonymous no-fault administrative trigger. We have shown that, in the assignment of the far-reaching task of determining federal spending levels, the ties that bind the Act's administrators to our elected representatives are barely discernible and, indeed, non-existent with respect to the making of the pivotal budget forecasts. And, we have demonstrated that unlike other cases that have sanctioned broad delegations, the key administrative determinations are to go unchecked not only by Congress but by the judiciary as well. We think it clear that if this congressional surrender of responsibility is sustained "the line which separates legislative power to make laws, from administrative authority" to enforce them (*United States v. Grimaud*, 220 U.S. 506, 517 (1911)) will not only remain restraint of definition, but will, once and for all, have evaporated.

II. THE ACT VIOLATES THE SEPARATION OF POWERS PRINCIPLE BY DELEGATING TO THE COMPTROLLER GENERAL, AN OFFICIAL REMOVABLE BY CONGRESS, A SIGNIFICANT ROLE IN THE ADMINISTRATION OF THE ACT.

The court below held that, because he is removable by Congress, the Comptroller General may not wield the executive power assigned him by the Act, without transgressing the separation of powers. J.A. 61. Congress has retained ultimate power over the Comptroller General, and thereby ultimate control in the administration of this law. Because Congress cannot both make and execute the law, the Act's automatic deficit reduction provisions are unconstitutional.

In analyzing the Comptroller General's powers under the Act, the court below stated that he is to exercise "substantial judgment concerning present and future facts that affect the application of the law," and, to a degree, to decide how the law applies to various govern-

ment programs. J.A. 72-73. The court characterized these as "executive powers in the constitutional sense." J.A. 73. In Point I above, we have argued that, insofar as the Comptroller General actually determines whether broad-based budget reductions will occur at all, and by what percentage, he is exercising the essentials of the lawmaking function. However, if he is not making law, then, at the very least, he has a very significant role in administering and implementing the law.²⁹ In coordination with CBO, whose role presents an overlapping problem of shared administration of the law,³⁰ the Comptroller General must make every meaningful final decision under the Act, beyond those already made by the legislature. That being the case, he is unquestionably exercising executive duties.

As appellants acknowledge, these duties, however they are characterized,³¹ were assigned to the Comptroller

²⁹ Upon receiving the OMB/CBO report, the Comptroller General specifies the levels of anticipated revenue and spending that dictate the gross amount required to be sequestered. As we demonstrated in Point I, his projections concerning the budget deficit and the resulting sequestration depend heavily upon his analysis of the state of the economy. After specifying the gross amount to be sequestered, he must then determine the particular budget outlays in each financial account that are to be reduced and in what amounts. Finally, he is required to submit a revised report, updating his earlier conclusions. The Comptroller General's findings are binding upon the President, leaving him no room for discretion in his execution of the law. Moreover, Section 253 of the Act requires the Comptroller General to report to Congress on the extent to which the President has complied with his order.

³⁰ We agree with the Congressional appellees that the role of CBO makes the Comptroller General even more vulnerable to congressional interference with his duties under the Act, since the Director is removable by resolution of either House, *see* 2 U.S.C. 601(a) (4) (1982). In addition, we agree, for the reasons stated in the Synar Brief, Argument II, that the participation of CBO represents an independent breach of the separation of powers doctrine.

³¹ Appellants characterize these duties variously as "administrative duties" (Sen. Br. at 18), "functions" or "traditional functions" (House Br. at 11-13), and "administrative functions" (CG Br. at 15, 42-47), studiously avoiding the description "executive." The

General a large part out of substantial fear that they could not constitutionally be assigned to the Congressional Budget Office, an undoubted creature of Congress. See Sen. Br. at 40; CG Br. at 39. But the court below accurately saw that the Comptroller General, too, owes his ultimate loyalty to Congress, and that therefore he cannot administer the law, any more than the CBO could have.

We shall show that separation of powers principles are indeed violated in this Act, that the Comptroller General is as a matter of fact and law beholden to Congress, and that the court below properly struck down the 1985 grant of power rather than the congressional removal provision of the 1921 statute.

A. Separation of Powers Principles Dictate That Congress May Not Both Make and Execute the Law.

The guiding principles of the doctrine of separation of powers are easy to recite, if sometimes difficult to apply. We know that it is an "archaic view" of the doctrine to require "three airtight departments of government," *Nixon v. Administrator of General Services*, 433 U.S. 425, 443 (1977), and that "hermetic sealing off" of the branches "would preclude the establishment of a Nation capable of governing itself effectively." *Buckley v. Valeo*, 424 U.S. 1, 121 (1976).

It is also clear that there is a need for "limiting principles" in permitting the crossing of the boundaries between branches of government. *Northern Pipeline Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 73 (1982). It is not the occasional blending of powers, representing the "pragmatic, flexible approach of Madison," *Nixon v. Administrator of General Services*, 433 U.S. at 443, with

Comptroller General would trivialize these functions by describing them as mere "factfinding functions" which are "far more circumscribed than functions assigned to other independent agencies." Br. at 43, n.125. In view of the substantial judgment and discretion required, as well as the sweeping impact of these decisions, it is surely inappropriate to view them as mere chores.

which we are here concerned. Rather, it is the retention by Congress of control over virtually the entire administration of the Act that breaches the principles.

The separation of powers principles are designed to ensure that "the carefully defined limits on the power of each Branch must not be eroded." *INS v. Chadha*, 462 U.S. 919, 958 (1983). The legislative veto device outlawed in *Chadha* was of course such an erosion, the fundamental problem of which "is that it represents an attempt by Congress to retain direct control over delegated administrative power." *Consumer Energy Council v. FERC*, 673 F.2d 425, 476 (D.C. Cir. 1982), *aff'd*, 463 U.S. 1216 (1983). J.A. 77-78. The same vice exists in the automatic deficit reduction provisions of this Act. If the President's power to execute the laws "refutes the idea that he is to be a lawmaker," then Congress' law-making power refutes the idea that it may also execute the laws. See *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579, 587 (1952).

In this Act, Congress' ultimate control over the Comptroller General and the CBO gives Congress continuing and pervasive influence in the Act's administration—precisely what the separation of powers forbids.³²

³² The Third Circuit recently held in *Ameron, Inc. v. U.S. Army Corps of Engineers*, Nos. 85-5226 and 85-5377 (March 27, 1986), that the Comptroller General could constitutionally perform the executive duties assigned him by the Competition in Contracting Act (CICA), 31 U.S.C. 3551-3556 (1984), notwithstanding that he is removable by Congress. The Comptroller General's role under CICA is to review government contract bid protests, the filing of which automatically stay the contract. Slip op. at 6-7. The Comptroller General's role is largely advisory, and, unlike his role under Gramm-Rudman, he has "no ultimate veto over government appropriations." *Id.* at 25. The Comptroller General's power under Gramm-Rudman is manifestly different. First, it is of a vastly greater magnitude, in that it involves considerable unreviewable discretion and affects virtually all federal programs and therefore all citizens. Second, it is of a different quality, in that under this Act, the Comptroller General exercises a power, unlike the ruling on individual bid protests, over which Congress has keen and abiding

**B. The Comptroller General Is Beholden to Congress
by Virtue of the Congressional Removal Power and
of His Complete Independence from the President.**

Although the President appoints the Comptroller General from among nominees supplied by Congress, it is Congress alone that has the absolute power of removal, accomplished by joint resolution, either with the President's concurrence or over his veto. 31 U.S.C. 703(a) and 703(e)(1)(B). He may be removed for any one of five reasons, including the open-ended "neglect of duty" and "inefficiency." *Ibid.*

The court below stated that the "here-and-now subservience" to Congress created by the Comptroller General's "presumed desire to avoid removal by pleasing Congress" creates the separation of powers problem. J.A. 57. Appellants all dispute this notion, taking particular umbrage at the word "subservience." CG Br. at 22-27; Sen. Br. at 18-20; House Br. at 31-33. But it is a matter of common sense that one looks for guidance and instruction to the power that keeps one in office. *Northern Pipeline*, 458 U.S. at 59-60.³³ Here, that power belongs to Congress, and, as we shall see, the President

interest. The power it has retained over the decisionmaking, by assigning the determinative roles to the Comptroller General and CBO, enables Congress to exercise dominion over the Act's administration, in violation of the separation of powers. For the reasons stated herein, we believe the Third Circuit simply did not appreciate the Comptroller General's dependence on Congress. But in any event, his roles under CICA and Gramm-Rudman are not comparable in kind and in quality.

³³ Appellants are in error in contending that because removal of a Comptroller General has not yet been attempted, the effect of the removability upon his powers is not yet ripe for adjudication. Sen. Br. 25-31. The court below easily disposed of this argument by relying on *Northern Pipeline*, 458 U.S. 50, in which the impact of the bankruptcy judges' unconstitutional tenure came from their dependence on the President's power to reappoint. The constitutional vice here, said the court, was "exercised" in the same way: it creates an impermissible subservience, here to Congress. J.A. 57.

possesses no part of that power, or any other power, over the Comptroller General.

Appellants all make a critical error. They take pains to demonstrate the "independence" of the Comptroller General, so as to show that he is not subservient to Congress. See CG Br. at 24-27; Sen. Br. at 18-20; House Br. at 20-24. But they do so by emphasizing Congress' unquestioned intent to guarantee his independence from the President. During the 1921 congressional debates, for example, where this office was born, the point of contention, as described in the Comptroller General's brief, "was whether and how Congress could protect the new officer from removal at the pleasure of the President." Br. at 24. The whole purpose, it said, was "to make him independent, and therefore he had to be free from the threat of discretionary removal by the President." *Ibid.* Even the frequent congressional and judicial references (see J.A. 71, n. 29) to the Comptroller General as an "arm" or "agent" of Congress³⁴ do not suggest, in appellants' view, subservience to Congress, but merely "protection against discretionary removal by the President." *Id.* at 26; Sen. Br. at 20, n. 23.

The demonstrable fallacy is in assuming that the greatest separation from the President gives greatest independence from Congress also.³⁵ On the contrary, between two coordinate branches of government, the greatest independence is at the mid-point. The con-

³⁴ See, e.g., *Bowsher v. Merck & Co.*, 460 U.S. 824, 844 (1983); *McDonnell Douglas Corp. v. United States*, 754 F.2d 365, 368 (Fed. Cir. 1985); *United States v. McDonnell Douglas Corp.*, 751 F.2d 220, 224 (8th Cir. 1984); *Delta Data Systems Corp. v. Webster*, 744 F.2d 197, 201 n.1 (D.C. Cir. 1984). See also, the numerous statutory powers and duties embodying the "special relationship" between Congress and the Comptroller General listed by the court below at J.A. 71, n.29; and 2 U.S.C. 703(b) and 41 U.S.C. 601, *et seq.*, listing GAO as in the legislative branch.

³⁵ The Comptroller General's brief even suggests that his status as "arm of Congress" is merely a "synonym" for independence. CG Br. at 27.

tinuum stretches from total dependence on the President at one end (removal at will) to total dependence on Congress at the other end (removal by Congress at will), with the position of greatest independence mid-way between, where careful balance exists in the power and influence of both branches. The court below properly saw the position of the Comptroller General as near the congressional dependence end of the scale.

We have no reason to doubt the genuineness of the Congressional intent to keep the Comptroller General "independent." It is obvious that many of his significant duties, such as the auditing of, and preventing illegal impoundments by, executive agencies require complete independence from the President. The critical fact for purposes of this case is that Congress did not itself relinquish control. It clearly made the judgment that the best way to guarantee the necessary independence from the President was to reserve to itself the power to direct the Comptroller General, to control his budget, and to remove him from office. The court below was quite correct to view that reservation of power as creating "subservience."

Thus, as the court below noted, "[o]nce an officer is appointed, it is only the authority that can remove him, and not the authority that appointed him, that he must fear and, in the performance of his functions, obey." J.A. 75. Indeed, control over an official's tenure in office has a greater effect over the independence of those officials than any other factor, with the obvious exception of one's compensation. *Northern Pipeline*, 458 U.S. at 60, quoting Alexander Hamilton, *The Federalist*, No. 79, p. 472 (McLean ed., New American Library 1961).³⁶

³⁶ Appellants argue that appointment in conformity with the Appointments Clause enables the Comptroller General to exercise executive power assigned him by the Act. Sen. Br. at 14-17. But proper appointment is merely a necessary prerequisite to the wielding of significant executive powers; it does not follow that all officers so appointed may exercise such powers. Nor does *Buckley v. Valeo*, heavily relied on by appellants, say otherwise. There, the

The House brief, in particular, argues that the ruling of the court below would prevent "independent agencies" from performing functions they have "traditionally" performed. House Br. at 10-14. But the court below did not speak to the question of what independent agencies can do. It held that the Comptroller General may not be regarded as "independent," in the same sense as the Federal Trade Commissioner was in *Humphrey's Executor v. United States*, 295 U.S. 602 (1935). The House brief simply begs the question of the Comptroller General's independence.³⁷

In establishing control over the Comptroller General's tenure, Congress has taken a giant step beyond its role approved in *Humphrey's Executor*. Instead of limiting the President's removal power, as it had done there, Congress kept for itself the power to remove the Comptroller General. The President cannot initiate removal; he cannot even prevent it if there is the support in Congress to override his veto.

Furthermore, the President has no other power which would offset Congress' absolute removal power. Although he appoints the Comptroller General, he selects from among nominees sent to him by Congress, making it extremely unlikely that he would wish to defend the Comptroller General, should Congress wish to remove him. He does not give instructions to the Comptroller General. And because the Comptroller General serves for a non-

Court merely observed that the Comptroller General cleared the initial appointment hurdle, without exploring whether this fact alone enabled him to perform significant executive powers comparable to those authorized under this Act. *Buckley*, 424 U.S. at 128, n.165.

³⁷ The Comptroller General's brief similarly begs the question by arguing that the district court's ruling implicitly prohibits an "independent" officer from performing the functions at issue, but that instead the officer must be removable by the President at will. Br. at 12, 42 n.125. Of course, the district court explicitly declined to so hold. J.A. 60. It merely held that the Comptroller General is not sufficiently independent of Congress to exercise the powers assigned him under the Act.

renewable term, the President cannot even use his power to re-appoint as a counterweight to the congressional removal power. See *Northern Pipeline*, 458 U.S. at 58.

In sum, the cumulative effect of Congress' ultimate control over the tenure of the Comptroller General and the absence of any control by the President over his tenure or his duties transgresses the principle "that makes one master in his own house [and] precludes him from imposing his control in the house of another who is master there." *Humphrey's Executor*, 295 U.S. at 630. There is no independence in this imbalance.³⁸

The fact that there has been no attempt to exercise the power to remove the Comptroller General does not suggest, as appellants would have it, that the power is vestigial. CG Br. at 31-33; Sen. Br. at 29-31. Its usefulness as an effective tool to guarantee allegiance does not require that it actually be exercised. It is not the act of removal, but the everpresent prospect that is of moment here. As the Comptroller General's brief notes (at 30, n.90), there are numerous instances in which officials resigned under a threat that charges would be brought against them. Thus, for most high government officials, the mere threat that public charges would be filed, alleging inefficiency, neglect of duties, or worse, is enough to cause them to step aside.³⁹

It is simply illogical to contend that the Comptroller General does not take cognizance of Congress' direct power over his tenure, and behave accordingly. Indeed, it is even possible that the fact that removal has never been attempted is a testament to the effectiveness of the

³⁸ Consequently, the Comptroller General is mistaken when he attempts to analogize his duties under the Act to the administrative role of the Board of Governors of the Federal Reserve System. Since Board members, unlike the Comptroller General, are removable by the President, albeit for cause, as are other independent agency heads, no separation of powers problem is presented.

³⁹ The unexercised legislative veto carries much the same threat, as noted by former Congressman, Judge MacKinnon, in dissent in *Clark v. Valeo*, 559 F.2d 642, 680-82 (D.C. Cir. 1977), *aff'd sub nom. Clark v. Kinnett*, 431 U.S. 950 (1977).

mere existence of the power as a device to ensure the Comptroller General's loyalty.

Finally, appellants argue that Congress' power to remove for cause is no more coercive than the similar presidential power approved by this Court in *Humphrey's Executor*, 295 U.S. 602, or the Senate's power to refuse to confirm a presidential appointment. CG Br. at 11, 27-30, 43. The argument, however, fails to recognize that the separation and balance between the branches are preserved in those situations, whereas they are violated here.

In *Humphrey's Executor*, there was no constitutional requirement of independence from the President. On the contrary, after *Myers v. United States*, it was thought that the President's power to remove, as incident to his constitutional power to appoint, was illimitable. 272 U.S. 52, 161 (1926); *In re Hennen*, 38 U.S. (13 Pet.) 230, 259 (1839). The question was whether Congress, wishing to ensure independence from the President, could constitutionally limit that otherwise illimitable power. The Court had no occasion to consider whether presidential removal power might be too "coercive"; rather, it merely accepted the premise that Congress may set the terms for removal to provide some security to the Federal Trade Commissioner.⁴⁰

The independence desired for the Commissioner was thus embodied in the statute, not required by the Constitution. The independence Congress sought was preserved by permitting *both* branches a role in the Commissioner's tenure. In contrast, here, as we have shown, the balance between branches is entirely upset by Congress' reservation of sole power over the Comptroller General's tenure.

⁴⁰ The court below noted that, whatever restrictions may be placed on the President's power to remove, that power derives from the constitutional power to appoint. Any greater impact upon an officer's independence from the President's power, as compared with the Congress' power, "may properly reflect the greater strength of that pedigree." J.A. 76-77.

Balance between the two branches is similarly evident in the Senate's constitutional power to refuse to confirm a presidential reappointment, a lesser intrusion in any event than for Congress to take a direct role in removal.⁴¹ Both branches play a role in the officer's tenure, and a measure of independence for the officer is preserved. But over the Comptroller General, the President has no balancing influence whatever.

In sum, the distinction between merely imposing restrictions on another party's power to remove and reserving that authority to oneself is plain. It is the total usurpation by Congress of the power over the Comptroller General's tenure that renders him subservient to Congress and incapable of administering the Act.

C. The Court Below Properly Struck Down the Act's Grant of Powers to the Comptroller General, Rather Than the Removal Provisions of the 1921 Act.

Appellants argue that if the powers granted to the Comptroller General under this Act and Congress' power to remove the Comptroller General cannot constitutionally co-exist, then the Court should choose which statute should fall. CG Br. at 15, 33-38; Sen. Br. at 31-2. In their opinion, congressional intent dictates choosing to invalidate the removal provision.

The court below properly refused to take that path. It regarded as extraordinary a suggestion that a court "even consider[] choosing" which statute to invalidate. J.A. 59. Based on the precedents of this Court, the district court found that the proper route was to set aside the statute embodying the alleged injury-in-fact that gives standing to plaintiffs. *Ibid*; see *Springer v. Government of the Philippines*, 277 U.S. 189 (1928); *Myers v. United States*, 272 U.S. 52 (1926); *Northern Pipeline*

⁴¹ See *Myers v. United States*, in which a veto by the Senate over presidential removal was said to be "a much greater limitation upon the executive branch, and a much more serious blending of the legislative with the executive, than a rejection of a proposed appointment." 272 U.S. at 121.

Construction Co. v. Marathon Pipeline Co., 458 U.S. 50 (1982); and *Buckley v. Valeo*, 424 U.S. 1 (1976).⁴²

Appellants now offer one case which they say supports choosing between constitutionally incompatible statutes; *Glidden v. Zdanock*, 370 U.S. 530 (1962, plurality opinion). CG Br. at 16-17; Sen. Br. at 34-5. In *Glidden*, the Court revisited the question of the Article III status of the Court of Claims and Court of Customs and Patent Appeals. The plurality and concurring opinions agreed that these courts had now become Article III courts. They rejected the argument that the courts' statutory authority to render advisory opinions destroyed the Article III status Congress had so clearly intended to create.

Contrary to appellants' assertion, the Court did not choose between constitutionally incompatible statutes. The plurality struck down neither (though it indicated how it *would* choose if it were necessary, 370 U.S. at 583), because it regarded the incompatible advisory opinion jurisdiction as so insignificant that it did not undermine the status of the Article III courts. Nor did the concurring Justices choose between the two statutes. Rather, they regarded the later statute which conferred Article III status on these courts as effectively voiding the earlier statute authorizing advisory opinions. *Id.* at 587. In other words, Congress had already made the choice. *Glidden* thus does not help appellants here.

Although the court below made it clear that it was inappropriate to consider invalidating the removal provision, it also made clear that, if it were free to choose and if congressional intent were the determinant, the Act's grant of powers would still have to fall. The court

⁴² The Comptroller General merely claims that these cases are irrelevant because "the asserted incompatibility existed within a single statute, not between the statute that the plaintiff[s] attacked and some other statute." CG Br. at 17, n.44. Besides the fact that no explanation is offered as to why a different rule should apply when two statutes, rather than one, are involved (in fact, the rule seems even more appropriate for separate statutes), two of those cases, *Springer* and *Myers*, concerned conflicts between statutes which were constitutionally incompatible with earlier statutes.

regarded it as doubtful that Congress would have chosen to give these powers to an official whom it could not remove. It noted that the House brief established clearly that a principal reason for granting this power to the Comptroller General was to avoid the perceived "pro-executive bias of the OMB." J.A. 60; *see also*, CG Br. at 39. As we have argued, Congress' ability to remove the Comptroller General is a key element of his independence from the President, and Congress regarded it as vital to retain that independence in this statute.

Moreover, to choose to invalidate the removal provision would inevitably alter the Comptroller General's relationship with Congress. It simply makes no sense to argue that it makes no difference to Congress or to the Comptroller General who has power to remove him. Removal by the President (or no removal at all) would unquestionably make him less dependent on Congress in form and in fact. Considering the close functional relationship between them, the many duties he performs of direct service to Congress, and the frequently adversarial relationship with the Executive Branch, described by the court below at J.A. 72-3, n.29, there is no reason to suppose that Congress would want to make such a fundamental change after 65 years of operation under existing assumptions. In addition, as the court below noted, there is no way to assess whether the Comptroller General's many powers would have been conferred on him at all if he were not removable by Congress. J.A. 60-61. Nothing in the legislative history or anywhere else suggests that Congress would tolerate such a change.⁴³

⁴³ The brief 1920 colloquy heavily relied upon by the appellants hardly "leaves no doubt" (CG Br. at 35) that Congress would have adopted the 1921 Act without the removal provision; to the contrary, it is clear that this isolated exchange carries no weight. The three congressmen involved essentially speculated as to the Act's fate if the Supreme Court found the removal provision invalid. Indeed, one participant, though he seemed to indicate a belief that a Court decision would not nullify the whole Act, admitted that he

There is simply no warrant, as appellants would have it, for assuming that congressional removal is of no consequence. On the contrary, the manner of removal was a bone of considerable contention in the 1921 Act, having been the subject of a veto by President Wilson, who believed the removal power should be his alone. Congress quite clearly went as far as it was prepared to go in agreeing to removal by joint resolution with the concurrence or over the veto of the President. It must be remembered that, even if Congress never expected to exercise the removal power, it did regard it as necessary to retain the power in order to keep it entirely out of the President's hands.

Finally, the existence of the fallback provision in the 1985 Act gives concrete guidance as to the choice between striking the powers or the removal. J.A. 60-61. Under the 1985 Act, we know quite clearly what Congress intended in the event part of the statute falls. We have no such advantage in the 1921 Act. Questions regarding how the Comptroller General could be removed (whether only by impeachment, or by the President, with or without cause), how the relationship between the Comptroller General and Congress would alter, and whether Congress would have wished to grant him the many powers it has if it did not possess the right to remove, can only be answered by speculating as to congressional intent. If the removal provision is to be rewritten, it is a job for Congress.

Neither does casting the question as one of "severability" help the appellants' argument; severability problems arise when a portion of a statute is held unconstitu-

had not given the question "any consideration." 59 Cong. Rec. 8611 (remarks of Rep. Good) (1920). That Congress ultimately viewed the removal provision as critical is underscored by the fact that the 1921 Act retained such a provision despite President Wilson's veto and various legislative suggestions that the removal power be eliminated. Appellants' reliance on various forms of the statute which did not contain the removal authority, CG Br. at 37-38, is unavailing, since those proposals did not become law.

tional, so that one contemporaneous question of congressional intent exists.⁴⁴ The inherently difficult problems of reconstructing hypothetical congressional intent are staggering when two statutes, passed 65 years apart are unconstitutional in combination.

Under the appellants' analysis, the Court would have to decide that the Comptroller General's 1921 auditing and accounting duties were constitutionally incompatible with congressional removal at the outset. It would then have to decide, in the face of considerable evidence to the contrary, that the 1921 Congress would have preferred the Budget and Accounting Act without congressional removal had it known that the entire statute could not stand. Finally, it would have to decide that none of the powers granted the Comptroller General since 1921 (*see, e.g.*, CG Br. at 21-22, n. 55), including the very significant powers granted in the Gramm-Rudman Act, would have made any difference to the 1921 Congress, *and* that the 1985 Congress as well would have chosen to give the same power to an official whom it could not remove.

Apparently undaunted by this task, appellants ask this Court to sever congressional removal from the statute which created the position, in order to preserve duties conferred upon that office some 65 years later. The judicial surgery required by this task is simply too radical to be undertaken safely.

⁴⁴ In *Regan v. Time Inc.*, — U.S. —, 104 S.Ct. 3262, 3269 (1984), relied on by the Senate, only one statute was involved; the same is true of the other leading severability cases: *Buckley v. Valeo*, 424 U.S. 1 (1976); *Champlin Refining Co. v. Corporation Commission*, 286 U.S. 210 (1932), and *United States v. Jackson*, 390 U.S. 570 (1968).

CONCLUSION

For all the foregoing reasons, the Act's automatic deficit reduction mechanism should be declared unconstitutional.

Respectfully submitted,

LOIS G. WILLIAMS *
Director of Litigation

GREGORY O'DUDEN
Assistant Director of Litigation

RICHARD S. EDELMAN
ELAINE D. KAPLAN
CARY P. SKLAR
Assistant Counsels

NATIONAL TREASURY
EMPLOYEES UNION
1730 K St., N.W., Suite 1101
Washington, D.C. 20006
(202) 785-4411

*Counsel for Appellees,
National Treasury Employees
Union, et al.*

* Counsel of Record

April 1986